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No. 80-2100

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
*Appellants,*

versus

HERMAN LODGE, et al.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF APPELLEES

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## QUESTIONS PRESENTED

I. WHETHER PURPOSEFUL DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT WAS PROVED IN THIS CASE

II. WHETHER STATUTORY ELECTION CASES MAY BE MAINTAINED WITHOUT PROVING INTENTIONAL DISCRIMINATION

III. WHETHER THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED ON THE BASIS OF THE FIFTEENTH AMENDMENT

IV. WHETHER THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED ON THE BASIS OF THE THIRTEENTH AMENDMENT

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## STATEMENT OF THE CASE
## PROCEEDINGS BELOW

This action was filed in 1976 challenging the use of at-large elections for electing county commissioners in Burke County, Georgia, on the ground that they had both the purpose and effect of discriminating against Black voters and candidates. The complaint was based on the Thirteenth, Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973. (R. 176, 180) Trial occurred in 1978 after discovery was completed.

After reviewing all of the evidence, the District Court concluded that "the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (J.S. 71a) The Court found that Blacks were "desperate to play a meaningful role in their local government," that the commissioners failed "to view problems with racial impartiality," that defendants had refused "to make Blacks a viable part of the county government," that the defendants' insensitivity "to the needs of the plaintiff class exists because of invidious racial motivations," that "in the past, as well as in the present, plaintiffs have been denied equal access to the political process," that "Blacks are shut out of the normal course of politics in this tightly-knit rural county," that Blacks have not had "meaningful political input," that the government has "retained a system which has minimized the ability of Burke County Blacks to participate in the political system," and that Blacks "unfairly have been denied a role in the political destiny of Burke County." (J.S. 78a-96a)

Having concluded that at-large elections were maintained for the purpose of discrimination, the District Court ordered elections to be held under a district election plan. (J.S. 96a-98a) That order was stayed by this Court pending appeal to the Court of Appeals for the Fifth Circuit.

On appeal, the Court of Appeals concluded that the District Court "correctly anticipated how the intent requirement in [past] cases would be applied to voting dilution cases . . . . It is clear . . . that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case." (J.S. 41a) After carefully reviewing the record and Judge Alaimo's opinion, the Fifth Circuit concluded that:

> [Judge Alaimo's] order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the County's Black residents to meaningfully participate therein. (J.S. 53a)

The Court of Appeals independently reviewed the evidence and agreed that purposeful, intentional discrimination had been proved.

> Judge Alaimo's evaluation of all of the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact virtually mandated by the overwhelming proof. (J.S. 53a-54a)

## FACTS

Burke County Georgia, like many southern counties, has a history rooted in slavery, discrimination, and plantation life. But Burke County is significantly different than many counties in the South. The resistance to equal rights for Blacks has been worse there than in virtually all other Georgia counties (T. 120-21), changes have been slight over the past fifteen years (T. 746-47), and one finds there:

> The fact that politics was perceived [as] a white man's game, the assumption on the part [of] white citizens that black people should be excluded. (T. 551)

There has been no instance in the history of Burke County where the government has voluntarily allowed Blacks to progress politically or economically. Progress has occurred only when there has been federal compulsion, and it has occurred only over the fierce opposition of the entire White community of Burke County. The resistance to Black political rights has been especially pronounced. The voter registration and election processes have been controlled to this day to minimize Black voting and political activity. Before the Voting Rights Act was passed in 1965, Blacks were virtually eliminated from voting. (J.S. 71a-72a) The voting process then was "completely arbitrary." (T. 554) Blacks who went to register were met with the "nasty" attitude of the officials (T. 152), others were made to drive over and over many miles between their residence and the one registration location in the County (T. 70-73, 93-96), and they had to apply to register on one occasion and come back later for a test. (T. 805) If you could not pass the literacy test, which was designed to exclude Blacks from the ballot, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), you would be subjected to Georgia's infamous "Question and Answer" test. A significant number of Blacks tried that test. (T. 812-13) It was designed to ensure their failure, as is apparent from reading the questions. (Ga. Laws of 1958, pp. 269, 279) Not everyone had to take these tests or come back to register, of course. "Certain people were allowed to register." (T. 554) Even some Blacks were allowed to forego the "technicalities" of registration, bypass the literacy test completely, and be registered on their first trip, so long as they had a White man vouch for them. (T. 312-14, 328)

With the passage of the Voting Rights Act, the county commissioners first tried to eliminate all but one polling place (Pl. Ex. 11, T. 42) since the County's impoverished Black residents would then be unable to get to the polls to vote. (J.S. 86a) Voter registration was limited to one day, with a short Saturday morning time as well. (Pl. Ex. 7, 10, T. 39, 41) The Saturday registration period was later elimi-

nated (Pl. Ex. 197, T. 200) without approval under Section 5 of the Voting Rights Act. (Pl. Ex. 276, T. 662) Although Black registration increased, no polling place was ever added to accommodate Blacks. The one polling place change that has occurred since 1965, moved the location further from the Black community. (T. 687) Armed White police and sheriff's men patrol the polling places on election day, which Blacks see as a "threat because they have always been a symbol of injustice to most Blacks." (T. 689, 736-37) The county government rarely allows a Black to work as a poll official, and never in a position of responsibility. (R. 56, 414-22, T. 28-29) Whites tried to stop one Black leader from voting because his city taxes were allegedly not paid (T. 741, 758-59), although there is no legal authority for that in Georgia.

To this day, voter registration has been made as difficult in Burke County as possible. The effect has been predictable. Even with the salutary result of the Voting Rights Act, Blacks are still only 38% of the registered voters in the County (J.S. 72a), Whites are 62% of the registered voters, and Whites are registered at a "rate" 50% higher per capita based on voting age populations.[1] By comparison, defendants' expert witness, Dr. Ira Robinson, testified by deposition that Blacks have been registered at nearly the same rate as Whites "in most places in the South" since 1968. (Robinson Depo. 9, T2 257)

For years, the County allowed voter registration only at the courthouse, which is a "symbol of injustice" to Blacks.

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[1] The preliminary 1980 census report indicates that Blacks are 53.7% of the County's population, but many Blacks leave Burke County when they are adults because it is "an undesirable place for Blacks" (J.S. 83a n.18), so the voting age percentage is lower. That exact figure is not yet available in the 1980 census, but assuming the ratios of older Blacks to younger Blacks, and older Whites to younger Whites, is about the same as in the past censuses, Blacks are 47.6% of the total voting age population. (Pl. Ex. 59, T. 66)

(T. 676). It is where a black man could be lynched (T. 244), where no Black has ever worked, other than as maid or janitor (T. 298-99), where no Black ever held elected office, and where a Black citizen cannot even expect fair treatment from the local courts. (T. 750) The vestiges of segregation are literally everywhere in the courthouse. (J.S. 77a-78a; T. 747-48) Blacks do not feel welcome at the courthouse, for obvious reasons. The most educated and outspoken Blacks in Burke County still feel anxious when they have to go there. (T. 676) The District Court commented on one witness's testimony:

> [If] they keep the courthouse as a central place of registration, that fact alone will discourage blacks attempting to register because of the history of the courthouse as being a symbol [of] repression. (T. 557)

Rural Blacks are "most reluctant" to go to the courthouse to vote, they expect to be "antagonized" if they go there, and they are "in fear." (T. 152-53).

Aside from the psychological deterrent, the use of a single registration site in an area as large as Burke County (which is 832 square miles and about two-thirds the size of Rhode Island (J.S. 91a)), inevitably excludes Blacks from registration. Defendants' expert, Dr. Robinson, testified that he was "shocked" by the number of families that had no automobiles. (Robinson Depo. 39) Eighty-two percent of these families are Black. *Id.* at 12-13.

By comparison, the City of Waynesboro—which is the county seat—has three registration sites to conduct its separate voter registration. The sites are more convenient to Blacks. (T. 757-58) The City covers less than one percent of the area of the County. It added its two additional sites after a consent judgment finding unconstitutional its at-large elections. (Pl. Ex. 83A, T. 633)

Blacks asked for ten years for a registration site in each of the 15 voting districts. (T. 733-34, Pl. Exs. 197, 198) The County lied to them and said it was illegal to register voters anywhere but at the courthouse, and Blacks had to ask the Secretary of State to intervene. (T. 733-34) Two years before trial, three additional sites were finally approved, technically. Even this token response was more form than substance. The sites were opened only for a few days before the 1976 election. The chief registrar, Metts McNair, stated "that will give people four days to register. They can do it in that length of time if they really want to." (Pl. Ex. 99, T. 639)

In fact, even this nominal announced registration did not exist for Blacks. A White man by the name of Butler was named the deputy registrar in Gough, a predominantly black area of Burke County. When Blacks tried to register there, Woodrow Harvey testified that Butler told them:

> [He] didn't know anything about the folks that were supposed to register. He said he had not been given any cards and he had not been notified that he was going to register people at his store. (T. 319-20)

The next day, Mr. Harvey's wife also went to see Butler.

> And she went up to Mr. Butler's store, he replied to her that he didn't know anything about any cards and he had not been told anything about it. (T. 320)

When Mr. Harvey asked McNair about this, McNair gave him the run-around. (T. 321)[3] At trial, McNair testified that Butler "didn't understand the process" (T. 952), al-

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[3] Mr. Harvey testified:

Q. Did you speak to him about registration?

A. He said if we were going to support a certain candidate, we had to have a lot more people to support him if we expected to get people registered in the City of Gough, that we had to have more people

though all Butler had to do was sign the card once it was filled out. McNair also testified, contrary to Butler's representations to Blacks, that he did in fact take cards to Butler. McNair then testified that he took the cards back from Butler in order to give him some of a different color. McNair was unable to suggest any excuse for that switch since the cards were the same, regardless of color. (T. 952)[3]

In soliciting Butler to serve as a deputy (T. 954), McNair refused the enthusiastic offers of Blacks to serve as deputy (T. 724, 955-56), he overlooked a Black store owner in the area who is civically active (T. 953-54), and he continued the historic refusal of Burke County to ever appoint a single Black deputy registrar. (T. 677) The defendants' witnesses could offer no reason other than race, of course, for that fact. (T. 954-56) Blacks had even volunteered to serve as deputies without pay since the County first gave them the excuse that they had no money to pay for deputies, and since this had been done in other Georgia counties. (T. 724) By comparison, the County eagerly appropriates funds to hire additional employees in order to purge voters. (Pl. Ex. 257, T. 660, 818-20)

The District Court and Court of Appeals properly found that the right of Blacks to vote was directly denied in Burke County, and that this "overt conduct was taking

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get out and vote, that Mr. Butler didn't understand how to handle the cards.

Q. Did he say anything else about Mr. Butler's handling the cards?
A. He didn't think he was capable of handling them.
Q. My next question is, then why would he give him the cards, if he were incapable of handling them? Was there any response to that?
A. He didn't have any response. (T. 321)

[3] McNair testified:

Q. Did you know what the difference was, if any, between the white card and the blue card or any other color?
A. No, sir, I didn't. (T. 952)

place even at the time the present lawsuit was filed." (J.S. 44a, 81a)[4]

The state-wide laws of Georgia are also designed to minimize voter registration because they allow registration only at fixed sites, which precludes mobile or house-to-house voter registration. Ga. Code §34-610(a). Defendants' own witness admitted that there would be no practical problem in conducting house-to-house registration in Burke County (T. 815), and the evidence was undisputed that this restriction particularly hinders Blacks. (T. 677)

For local elections, Burke County has been a one party county since Reconstruction, and Democratic nominees invariably win. (J.S. 87a) Although the Democratic White primary was struck down by this Court 38 years ago, *Smith v. Allwright*, 321 U.S. 649 (1944), the Burke County Democratic Party remains the "party [of] elimination of black people in any office." (T. 566) Of the twenty-four members of the county governing body of the Democratic Party, only one was Black (J.S. 50a), and he was unable to ever attend a meeting because they were conducted during business hours when he worked. (T. 438, 532-33, 914)

The District Court found that the segregated Democratic Executive Committee plays an important role in local politics. (J.S. 87a) That should be obvious since the party's nominees invariably win local elections, the Committee members are the leading party members in the County, and

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[4] The slight expansion of voter registration, by the addition of three sites, occurred only after "friendly persuasion" by the District Court. (J.S. 44a-45a n.13) While the appellants now suggest otherwise (*Brief of Appellants* at 32), they never challenged this finding as clearly erroneous below. Their statement of the events ignores the fact that the registration sites were not actually made operative when they claim, they were only open for several days initially, Blacks were not even allowed to register at one of the sites, and the sites had not been permanently approved even by 1978. (Pl. Ex. 197, 198).

elected officials almost always come from that group. Every elected official who was asked at trial testified that he was a member or officer of the Burke County Democratic Committee. (T. 437-39, 474, 532, 880, T2 98-99, 137-38)

The Democratic Executive Committee has always operated as a self-perpetuating "club." Members are either appointed to vacancies by the other members (T. 437-39), often taking their fathers' position (T. 437, T2. 150), or they are solicited by the members to run for election, invariably without opposition. (T. 913) The Democratic Committee is virtually unknown in the Black community. (T. 692) Until recently, the Democratic Party conducted the primary elections in the County. (T2 99) The Party still handles the qualifying process for individuals who want to run for its executive committee posts, and for individuals who want to run in the primary to seek nomination for public office. (T. 884, 894-95) The procedure for qualifying to run in the democratic primary is a virtual secret. As the party chairman testified, he "can tell them how it is done" if anyone asks how to qualify. (T. 889-90) They would "have to see the secretary of the Democratic executive committee." (T. 884) Blacks would have no idea who to ask, however, since they are excluded from the Democratic Party, and few have even heard of the Executive Committee. (T. 692) The Committee has published short legal advertisements that announce elections, but they are hardly designed to give any real public notice of the elections or qualifying process. They are little formal ads contained among foreclosure notices and the like, and, as expected, Blacks have not seen the ads. (T. 737, 894, D. Ex. 16, 17, T2 262) The Committee has ignored state and national party rules on fair representation, and it received no input from Blacks when it set up districts for electing its members in 1976, as required by State rules. (J.S. 87a-88a, T. 890-93) The districts adopted by the Committee all had White voting majorities. (T. 534-42, 891-92)

There are other reasons why Blacks are not registered in Burke County, each rooted in past and present discrimination and racial oppression. Blacks still have a tremendous amount of fear, both of physical harm and of economic retaliation, that might be experienced were one to enter the "white man's game" of politics. In the few years before this case was filed, Black people were shot at in Burke County for seeking equal rights (T. 113, 125-26, 134, 682-83), they received bomb threats and harassing phone calls, and they were the subject of physical harassment. (T. 206-07, 671-73, 684) Appellee Herman Lodge, received "some very nasty" phone calls simply because this case was filed. (T. 672-73) Blacks must operate virtually "in secret" to avoid the possibility of reprisal for political activity. The Burke County Improvement Association cannot maintain membership records for fear of reprisals if they were discovered. (T. 670, 709)[8] Some Blacks still fear their ballot is not secret because of past practices of White voting officials. (T. 689-91)

Blacks in Burke County suffer a precarious economic existence that is "in part caused by past discrimination." (J.S. 83a) Their poverty, the fact that Whites control nearly all the money and jobs in the County, and the history of severe oppression leaves many Blacks afraid to simply register to vote. They fear repercussions they cannot afford.[9] Fear has

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[8] One witness testified:

> Well, we did not keep membership records because of the fact that a lot of people in there would be vulnerable, I guess, to reprisal, and they were afraid to, you know, to help but, afraid because of certain positions, that is, the teachers were real vulnerable and in a real vulnerable position during this period. (T. 670)

[9] One witness testified:

> There was fear in regard to registration . . . . [T]he black population, of course, of Burke County was a population which had [a] great degree of dependency which is a political thing throughout the plantation society, growing out of the low income, the under-employment and such phenomenon as that, as well as their vulnerability to white

always been pervasive in Burke County, and it remains so to this day. (T. 115, 120, 126, 134, 136-37, 152-53, 177-78, 551-53, 555, 670-77) Their poverty has formally excluded them from office since there has been a "freeholder" requirement to serve as county commissioner since 1911. (Ga. Laws 1911, p. 390; Ga. Laws 1931, p. 400; J.S. 65a n.2, 75a)

Both plaintiffs' and defendants' witnesses suggested that the depressed Black educational levels also contributed to their under registration, and lack of access to the political process. (T. 675-77, 912) That is obviously a product of discrimination, as the defendants concede. (T. 912)

The at-large election device itself directly minimizes Black political activity. Since blacks cannot win in a county-wide election, there is no reason to run, and they are further alienated from the political process. There is little reason to vote since the choice among the white candidates is just a matter of choosing the "lesser of two evils." (T. 694)

The county commission controls public affairs in Burke County by appointing individuals to many boards, authorities, committees and other offices, including the elections board. Blacks are rarely appointed (R. 57, 88-94, T. 30, J.S. 78a), and when they are, federal funds and Title VI of the

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employers and what have you. And the apparent acceptance by whites of the behavior towards blacks of intimidation by whites towards blacks . . . .

. . . .

They would have this feeling of intimidation because of their vulnerability in terms of jobs as time went on and because of welfare dependency. (T. 552)

Another witness testified:

Now, there is fear of economic reprisal from you know, like people say, well, I'm not going to vote because if I go to register, my welfare check might be cut off. (T. 675)

1964 Civil Rights Act are the cause. (E.g., Pl. Ex. 28) Defendants admit that there are no particular qualifications for these positions, that Blacks are as equally qualified to serve on these boards as Whites, and that there is no objective reason why Blacks had not been appointed. (T. 399-402, 445, 478) The commissioners solicit Whites for the posts (T. 399-400), but overlook Blacks even when they seek appointment. (T. 184) As one commissioner testified, Blacks are not appointed because: "That's just the way things are." (T. 296)

The exclusion of Blacks from these boards reflects the firm refusal of the county commissioners to accord Blacks any role in the political process. The boards are important elements of government, they control many public operations, and they make policy recommendations to the county commissioners. (T. 401) The exclusion of Blacks from these posts eliminates them from having input into the operation of much of government. (T. 401-02) Their exclusion also undercuts the opportunity for Blacks to participate in politics. They are denied the public experience and exposure that is an integral part of politics, and they are deterred from political activity. One witness testified:

> If it is not by appointment of black people to government agencies, you remove from the activism of a community just a special kind of reward. On that, I think it has an effect upon the motivation to continue. (T. 565a)

The commissioners' refusal to appoint Blacks tells the entire community, both Black and White, that white supremacy remains the policy of Burke County. It is "a general signal to the overall community about how their affairs are to be conducted. . . ." *Id.* As the District Court concluded:

> [The] Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a mean-

> ingful fashion, is without doubt an unfair denial of access of input into the political process. (J.S. 89a)

This evidence is very telling. Since the commissioners do not feel Blacks are suited to hold these appointed positions, they would hardly believe that Blacks should serve on the commission itself.

Much other evidence is also telling about the attitudes and motivations of the county commissioners. The entire theory of the defense in this case, in fact, sounded like the traditional justifications for White supremacy. The defendants and other public officials testified that it was not the at-large election system or other government action that excluded Blacks from the political process, but the fact that Blacks "do not take an interest in [politics]" (T2 166), that they "just have an interest in other things" (T2 169), that they "wouldn't think that [Blacks] would be interested in politics" (T. 799), and that Blacks do not register because of "indifference, don't care about politics probably." (T. 807) As the long-time state legislator from Burke County stated:

> They don't seem to care about [the] political process, I think they work hard and they worship and they're very interested in their relations and affairs, but they do not take an interest in the political process. (T2 166)

To casually dismiss the historic elimination of Blacks from the political process because they are "indifferent," is strikingly similar to the historic justification for White supremacy—that Blacks are not political beings, and that one would not expect them to be holding office or an appointed position with a board. Since Burke's Whites believe that Blacks are not political beings, it is easy to rationalize the exclusion of Blacks from the elective process.

The county commissioners, who are the most powerful figures in the County politically (T. 215-16), demonstrated

their lack of concern for, and outright hostility towards, Blacks' civil and political rights in other ways. For example, while the County employs Blacks only in menial positions (J.S. 75a, 85a, 94a)—and while those Blacks who are employed are usually hired only where there is federal money and the compulsion of Title VI of the Civil Rights Act (J.S. 76a)—the county commissioners see no problem with this situation. Commissioner Buxton testified that it was "obviously" the custom to rarely employ a Black person in county government, and "that that has been the situation during the last eight years during the time that [he has] been County Commissioner." (T. 299) Commissioner Marchman testified that the County doesn't "have any hiring policy" (T. 240), that they have never issued any "policy suggesting that Blacks be hired equally" because they "never have realized a problem in that area," and he didn't "see any problem . . . in terms of black employment . . . with the County Government." (T. 241)

Commissioner Marchman publicly stated that he "could care less" about having a swimming pool built at the public park that is used by Blacks, although the White pool in the County, which is now owned by the Jaycees, was given to them by local government to avoid desegregation. (T. 232-33) Two commissioners indicated their present belief in segregation. (T. 257-59, 264-66, 279) Another testified that desegregation might conceivably be accepted in Burke County in another thirty years (T. 378), and another testified that Blacks were referred to as "niggers" in county commission meetings. (T. 242-44) Apparently acknowledging the absolute separation of the races in Burke County, one commissioner testified that "I can't speak for them [Blacks]." (T. 388) Another testified: "I'm speaking as a white person, but I don't know what a black person thinks." (T. 309) This same man, when asked if this hindered his ability to represent Blacks, testified: "I don't get you." (T. 308-09)

The chairman of the county commission believes that Black people inherently trust Whites more than they do Blacks (T. 389-90), a notion that is part of traditional White supremacist thinking. In the county courthouse, which is under the control of the commissioners, the "nigger hook" still hangs in place (J.S. 77a), the "colored" and "white" signs have never been eradicated from the courthouse restroom doors (J.S. 78a), the seating in the courtroom remains segregated (T. 747-48), and the judicial process there hands out justice unequally. Crimes against Blacks are barely punished, while crimes against Whites are punished most severely. (T. 750) Notwithstanding the exceptionally high degree of segregation and discrimination that remains in Burke County, the commissioners believe that nothing should be done about it. (T. 256-57) The commissioners believe that nothing need be done about racial discrimination because "the Federal Government took care of that." (T. 299-300)

The commissioners' adherence to segregation and support of a status quo which refuses to accord Blacks full civil and political rights, is naturally a reflection of the White community that elected them. In Burke County, the Whites have always been "in tremendous horror of blacks coming into power there" (T. 115), the changes from the old patterns and attitudes of segregation have been slight over the past fifteen to twenty years (T. 213, 562), and Whites have vehemently opposed every effort by Blacks to move forward. The battle over equal education is typical. Before this Court's 1954 desegregation decision, Black education was dramatically inferior. The per student value of books and teaching aids in the Black schools was one-tenth that in the White schools, the per student plant maintenance and operating budget for the White schools was thirty times that in the Black schools, the per pupil investment in White schools was ten times that in the Black schools (Pl. Ex. 278, pp. 2, 3, 14, 15, 16, & 17, T. 662), and Blacks attended one-room schoolhouses that contained grades one through seven

in a single room. The facilities were "vastly different" for Whites and Blacks. (T. 666) Until the early 1960's, the County closed the Black schools down until mid-October to ensure that Blacks would be available to pick cotton for the White farmers. (T. 667)

In the 1960's the Burke County delegation to the State commission on school desegregation "presented the most overwhelming vote [of all the delegations] in favor of . . . closing public schools" to avoid desegregation (Pl. Ex. 126, T. 643). The county officials were unanimous that Burke County "would never integrate" *id.*, the county commissioners resolved that there should be a private school to avoid desegregation (Pl. Ex. 31, T. 48), and they called upon the government to pay tuition "to the parents who send their children to Burke Academy, Inc." (Pl. Ex. 32, T. 49). The County received national attention for its vehement response to *Brown*. (Pl. Ex. 128, T. 643) When a school desegregation suit was filed in 1968, the chairman of the board of education announced that the schools would remain segregated at least until some order "by the Court," and the county commissioners announced that they were "legally and morally obligated" to pay attorneys' fees in defending the segregated system. (Pl. Ex. 89, T. 635)

Because of the extreme racial hostility in Burke County, freedom of choice was a complete failure there. Not a single White went to a Black school, and very few Blacks had the courage to cross over. (Pl. Ex. 147, 226-28, T. 647) Of those that did, one was nearly assassinated when she lay sleeping in her bed at home. (T. 133, 124-26, 134, 682-83) Only one White person in the entire County supported desegregation, and he was shunned and harassed because of it. (T. 206-07) The school board tried to avoid full desegregation by making all Black schools vocational schools, all White schools college prepatory, and tracking the students based on preschool-age tests. (Pl. Ex. 156-57, T. 648)

The private Edmund Burke Academy was begun to avoid desegregation. The local bar association volunteered its services to the Academy as a "pro bono" project. (Pl. Ex. 129, T. 644) Its list of incorporators included most of the public officials in the County, including some of the appellants in this case. (Pl. Ex. 131, T. 644, 470-75) The Academy began operations with a building given it by the County Board of Education (Pl. Ex. 132, 215, T. 645, 56), which still allows the Academy to use its facilities so long as the federal government does not interfere. (Pl. Ex. 173, T. 650) The State provides books (T. 429-30), the county commissioners personally serve on the Board of Directors and send their children there, and appellant Rogers has given the school six acres of land for a nominal sum. (T. 266, 375-76, 470-77, 486-87, Pl. Ex. 211, T. 655) As the local newspaper editorialized about the Burke Academy:

> [We] are no longer cursing the Supreme Court, we are now standing to one side and watching them butt their heads against a stone wall. (Pl. Ex. 128, T. 643)

The educational picture has not improved today. Most Whites who can afford the tuition still attend Burke Academy (T2 88, Pl. Ex. 95, T. 637), the school superintendent still rails about the "assinine" desegregation decisions of this Court (Pl. Ex. 237, T. 658), many activities are no longer carried on in the public schools since integration (T. 698-99), and private facilities such as the local White country club are no longer available for the students to use. (T. 697-98) As the District Court found:

> [The] unbroken history of an inferior formal education has had and does now have a strong tendency to preclude Blacks' effective participation in the political process. (J.S. 84a-85a)

The fierce resistance to school integration typifies race relations in Burke County. Unlike most counties in the South, no biracial committee was formed to deal with racial

problems (T. 420), Blacks and Whites had never even met before 1967 to talk about racial problems, (T. 117), and there was much noncompliance with federal desegregation laws. In the 1970's, only one doctor in Burke County had desegregated waiting rooms, the county hospital was still segregated, the County Health Department treated Blacks so badly that some turned down its free services (T. 194-200, 216-17, Pl. Ex. 223), and White doctors refused to certify Black patients as disabled when they sought disability benefits. (T. 123-24) When the 1964 Civil Rights Act was passed, the owner of the one downtown lunch counter closed his business rather than integrate (T. 684), the movie theater remained segregated a decade after the 1964 Civil Rights Act, and when Blacks finally did try to leave the balcony and sit downstairs, state troopers had to intervene. (T. 685-86, 732-33) There are two laundromats in Burke County, today, one Black and the other White. The White one is situated prominently one half block from the County Courthouse (T. 321-22), and Blacks are allowed there today only if they go to wash a White person's clothes. (T. 321-22, 332-33, 740)[7] "Whites only" signs are displayed openly on houses for rent (T. 334), deeds are sometimes still filed reflecting whether the property is Black or White (Pl. Ex. 212, 655), and poor Whites will not even avail themselves of

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[7] Just a few days before trial, a black woman entered the white laundromat. She testified that:

> [The man in charge] stretched his arms out then and said, don't you see that sign on the door? I said, yes, I see that it says private. So, what does that mean? He says, that means if you're colored, you can't use the wash house. There's one on Eighth Street, one on the other side of the railroad tracks, why don't you go over there and use that one. And I said I prefer to use this one. So then he said, *the way you colored people acted a long time ago, we were able to deal with you, but now you're pulling all kinds of things and stuff.* So, I said, if I wash my clothes here what will happen and he said, if you just hang around here until the boss man gets back, you will see what will happen to you. (T. 333) (emphasis added)

government assistance if it means associating with Blacks. (T. 141-42, 340)

Segregation in Burke County remains remarkably entrenched. All private organizations are segregated (T. 276-77, 233-37, 279-83, 296-97, 309-11), there is no cross-race social mixing (T. 238-39), and Blacks do not travel in White areas even though Burke County is rural and Black and White neighborhoods are close. (T. 323).

Segregation has a tremendous impact on politics in Burke County. It nurtures the pattern of racial bloc voting which ensures that Blacks cannot win at-large elections. (J.S. 46a) Blacks are entirely foreclosed from participating in the political and social processes which determine who the political leaders will be, Whites personally know prospective White candidates, and "[w]hen this factor is combined with the virtual segregation of all social, religious, and business organizations . . . , the result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county." (J.S. 88a-89a) As the Court of Appeals concluded: "Person-to-person relations, necessary to effective campaigning in a rural county, [are] virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks." (J.S. 49a-50a) Burke County is a "continuation of the old southern pattern of keeping Blacks out of politics." (T. 587)

The District Court found that Blacks are completely excluded from the political process. The Court commented:

> It is the Court's impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The Commissioners have been singularly unresponsive to this need. (J.S. 78a)

Blacks have been "forced to attack [the system] from without" by court orders and economic boycotts.[8] Blacks were excluded from the grand juries and trial juries in Burke County until a federal court order was entered in 1977. (J.S. 75a, Pl. Ex. 82A, T. 632-33) Blacks were unconstitutionally excluded from elections in the City of Waynesboro until the at-large election system was eliminated by court order in 1977. (Pl. Ex. 83A, T. 633). Excluded from meaningful political input by at-large elections, their sole voice has been to organize economic boycotts. (T. 668-69).

It is clear that county-wide elections exclude Blacks from political office. No evidence suggested that a Black could get elected. The local state legislator, who is also the Secretary of the Democratic Committee (T2 137-39), admitted that a Black could not be elected county-wide. He testified:

> Q. . . . [Y]ou knew full well that Burke County would never elect a black? You knew that, didn't you?
> A. Yes. . . . (T2 168)

There was no substantial evidence that at-large elections served any other function in Burke County. One of the defendants' witnesses was asked to compare district and at-large voting in Burke County. The "only reason" he could think of to distinguish the two was race and a desire to prefer one race over the other.[9] (T2 101-02) If the purpose of a district system would be to give "an unfair advantage" to

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[8] "Blacks have been forced outside the local government for relief. They went to the courts to seek school and Grand Jury integration . . . , and to the streets to 'agitate,' as defendants have said, to get lighting at the Davis Park Ballfield. Outside pressure had to come to bear before the county budged." (J.S. 81a)

[9] Q. Do you have any preference yourself as between the present system of countywide elections and the elections by the voters only in a district of the county?
A. I would prefer it being like it is.
Q. Why is that?

Blacks — by allowing them some participation in the political process — maintaining at-large elections must certainly have the purpose of denying Blacks that "advantage."

To determine whether there were any practical drawbacks to a district system in Burke County, two of the county commissioners were asked what problems they would face if they were drawing up a district election plan. They saw none. They just testified that the districts would have to have equal populations. (T. 422-24, 462) Commissioner Robert Webster testified that at-large elections served no purpose in comparison to district elections.[10] Some of the defendants' witnesses attempted to offer one justification or another for county-wide elections. They were not convincing. Judson Thompson, a past commissioner and Chairman of the Democratic Party, testified that it was impossible to draw districts with equal populations in Burke County. (T. 883) Mr. Thompson's testimony was an apparent effort to fabricate a pretext for at-large elections. It is easy to draw election plans with equal population districts, and neither plaintiffs nor defendants had any difficulty in submitting district plans to the Court. (E.g., Pl. Exs. 300, 301)

Another witness suggested that there might be a problem in drawing districts because they could cut across the militia lines in the County. But the same witness admitted that there were no problems where state legislative districts cut across the militia district lines (T2 114), district election plans could be drawn that would hardly deviate from the militia districts (Pl. Ex. 301), Georgia law allows for elec-

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A. Well, the only reason I can think of doing a district would be to fix the districts at such gerrymandering which would bring about an unfair advantage to one race. (T2 101-02)

[10] Q. It is your testimony, isn't it, that in the event the county was divided into districts, it would not make any difference at all?
A. I think I've said that, yes. (T. 484)

tion districts to be modified so that they do not have to correspond to militia district lines, Ga. Code §34-702, and there were any number of other ways of accommodating a change to districts.

Appellants offered testimony that county-wide voting might avoid "political deals and trades" in Burke County, but these witnesses were not familiar with any of the district systems in operation in Georgia, and their testimony was admittedly speculation. (T. 390-91, 451, 909-11) Moreover, since Blacks would become part of the political process under a district system, since they would enjoy full political rights and public office then, and since they would be able to deal from an equal basis with Whites, there would in fact be a new breed of "political deals and trades" in Burke County. Since Whites "generally . . . have the same interests" in Burke County (T2 141), the political dealing the defendants fear must be solely what would occur between Whites and Blacks. To justify at-large elections because they preclude "political dealing" in Burke County, is virtually to admit that their purpose is to exclude Blacks from the political process, to maintain the status quo of political domination by Whites, and to eliminate any Black voice in county government.

The District Court concluded that at-large elections were maintained in Burke County for invidious purposes. Judge Alaimo found that voter confusion would not be a problem with district elections, and he concluded that it was so simple to institute district elections that it could be done in a few weeks time. (J.S. 98a) The Court noted that the Burke County Democratic Party elected its governing board from districts, that this district scheme created no problem whatsoever, and that other local governments elected by districts in Georgia appeared to function perfectly well. (J.S. 91a) The Court concluded that "defendants are heedless of the needs of the Black community" (J.S. 95a), that Burke County's representatives "have retained a system which has

minimized the ability of Burke County Blacks to participate in the political system" (J.S. 90a), that the "Commissioners have been singularly unresponsive to this need" of Blacks to participate meaningfully in local government (J.S. 78a), that the insensitivity of defendants to the needs of the plaintiff class "exists because of invidious racial motivations" (J.S. 82a), and that the at-large election process in Burke County "has been subverted to invidious purposes." (J.S. 90a) The Court of Appeals affirmed in all regards, stating that:

> Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact, virtually mandated by the overwhelming proof. (J.S. 53a-54a)

The events which transpired after the trial court's judgment dramatically confirm Judge Alaimo's conclusion. A special election was ordered for November, 1978, and it included five districts with two that had a majority of Black registered voters. One Black qualified to run in each of the five districts, one White qualified in three of the districts, and two Whites qualified in the other two. (J.S. 63a, 97a, Stipulation Filed October 27, 1981) Although this Court stayed that order before the election occurred, one of the white candidates dropped out, before the stay, from each of the two districts where there was another white candidate running. (Stipulation, *supra*) This is the only instance in the history of Burke County where one can see what happens under district elections, as compared to at-large elections. Under districts, Blacks are involved in the political process and run for office. Under an at-large system, none are even on the ballot. Even more telling is the manipulation by the White candidates to minimize the possibility of a Black being elected. The obvious explanation for the two Whites dropping out of the election, is that they did not want to split the White vote between themselves and the

other White candidates, which would have given the Black candidates a good chance of election. Whites in Burke County would rather forego public office themselves, than make it possible for Blacks to get elected.

## SUMMARY OF ARGUMENT

The District Court and the Court of Appeals concluded that at-large elections were maintained in Burke County for the purpose of discriminating against Blacks. That conclusion was based on a tremendous amount of evidence from which the lower courts inferred a discriminatory purpose. The evidence was mostly circumstantial, and circumstantial evidence is sufficient to prove motive in a Fourteenth Amendment case, just as in all other areas of law where motive is relevant. The evidence here is more than sufficient to support the judgment below, and the findings are surely not clearly erroneous.

Appellees also rely on Section 2 of the Voting Rights Act of 1965 as an alternative basis for affirmance. Section 2 applies in cases where districting schemes are challenged, and it is not necessary to prove intentional discrimination in a Section 2 case. It is sufficient, at the very least, to prove that the challenged system perpetuates the effects of past discrimination.

Appellees also rely on the Thirteenth and Fifteenth Amendments. Neither requires proof of a specific intent to discriminate. The Thirteenth Amendment is broader than the Fourteenth Amendment in a number of ways, most importantly because it reaches purely private conduct. The Fifteenth Amendment necessarily provides a stronger cause of action for a plaintiff in a vote dilution case, than does the Fourteenth Amendment, because the Fifteenth Amendment applies specifically and exclusively to voting. Any other interpretation of the Fifteenth Amendment would render it meaningless.

## ARGUMENT

### I. Purposeful Discrimination Under the Fourteenth Amendment Was Proved In This Case

#### A. The Evidence of Intentional Discrimination In This Case Entirely Supports The Lower Courts' Conclusion That At-Large Elections Are Maintained In Burke County For The Purpose of Discrimination.

The issue in this case is straight-forward. It is whether indirect evidence will support a court's conclusion that an election procedure is maintained for discriminatory reasons, or whether direct proof of discriminatory intent is required. The Court of Appeals held that indirect proof was sufficient.[11]

> [I]t is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination . . . . Circumstantial evidence, of necessity, must suffice, so long as the inference of discriminatory intent is clear. (J.S. 8a)

This Court has expressly held that circumstantial evidence may be used in the overall inquiry. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429

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[11] The Court of Appeals reasoned:

> We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate." Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply, there will be no "smoking gun." (J.S. 8a n.8)

U.S. 252, 266 (1977). As Justice Powell wrote in *Arlington Heights*, it would be an "extraordinary" case where a legislator would take the stand to testify about his intentions. Circumstantial evidence is therefore necessary, and courts should focus largely on extrinsic factors, as this Court indicated in *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 n.24 (1979).[12] In all other areas of the law, evidence of the sort offered here would be far more than necessary to support the judgment. The rule on sufficiency of the evidence should be no different in this case. *Compare FPC v. Florida Power & Light*, 404 U.S. 453, 468-69 (1972); *Michalic v. Cleveland Tankers*, 364 U.S. 325, 330 (1960); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957).

The District Court here complied fully with this Court's purposeful discrimination decisions. After reviewing all of the evidence, the Court concluded that "the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (J.S. 71a) The Court found that Blacks were "desperate to play a meaningful role in their local government," that the commissioners failed "to view problems with racial impartiality," that Blacks are given the "run around" once they make their needs known, that defendants had refused "to make Blacks a viable part of the county government," that the defendants' insensitivity "to the needs of the plaintiff class exists because of invidious racial motivations," that "in the past, as well as in the present, plaintiffs have been denied equal access to the political process," that "Blacks are shut out of the normal course of politics in this tightly-knit rural county," that several factors, "all of which seem to be related to past discrimination, operate unfairly to ex-

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[12] "Proof of discriminatory intent must necessarily usually rely on objective factors . . . . The inquiry is practical. What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid." 442 U.S. at 279 n.24.

clude Blacks from the normal course of personal contact politics in Burke County," that Blacks have not had "meaningful political input," that the government has "retained a system which has minimized the ability of Burke County Blacks to participate in the political system," and that Blacks "unfairly have been denied a role in the political destiny of Burke County." (J.S. 78a-96a)[13]

Although the District Court did not have the benefit of this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court followed the earlier intent decisions. As the Court of Appeals stated:

> A court that correctly anticipated how the intent requirement in past cases would be applied to voting dilution cases, as in *Bolden*, could correctly interpret and apply the law, without the benefit of [*Bolden*]. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case. . . . It is clear . . . that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case. (J.S. 41a)

Judge Alaimo discussed and considered *Zimmer* kinds of evidence, as he is authorized to do under *Mobile*, but he made findings of intentional discrimination that were based on the entire record. After carefully reviewing the record and Judge Alaimo's opinion, the Fifth Circuit concluded that:

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[13] Commenting on the county commissioners' refusal to allow Blacks any meaningful participation in the political process, the refusal to acknowledge other legitimate interests and needs of Black citizens, and the commissioners' dedication to preserving an all-White political structure with the at-large election system, the Court found: "The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. Such indifference attests to the Commissioners' realization of the Blacks' political impotence, both individually and collectively." (J.S. 95a)

[Judge Alaimo's] order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the County's Black residents to meaningfully participate therein. (J.S. 53a)

The Court of Appeals independently reviewed the evidence and agreed that purposeful, intentional discrimination had been proved. The Court characterized the evidence of intentional discrimination as "overwhelming." (J.S. 54a)

The Fifth Circuit followed Justice Stewart's opinion and rejected the *Zimmer* test as a categorical way of determining the constitutionality of at-large elections. In rejecting *Zimmer*, Justice Stewart wrote that the trial court must focus on the ultimate factual issue—what is the *purpose* that motivates the adoption or retention of the scheme? The Court of Appeals plainly recognized this requirement and the limits of *Zimmer* evidence.[14] (J.S. 35a)

At the same time, the Court of Appeals held that the *Zimmer* criteria might have some evidentiary relevance in determining purpose, as the *Mobile* plurality recognized, but that other criteria and evidence must be considered as well. The Court held that the *Zimmer* criteria may provide some evidence of intent, but they were "not dispositive on the question of intent." (J.S. 39a) That is precisely Justice Stewart's view in *Mobile*. 446 U.S. at 73. The Court of Ap-

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[14] The Court of Appeals held that:

> Though four Justices were satisfied with the *Zimmer* criteria [in *Bolden*], five Justices clearly rejected the exclusive use of those criteria for inferring purpose or intent. We conclude that they rejected the use of *Zimmer* criteria to the extent that [the Fifth Circuit], in *Bolden, presumed* the existence of a discriminatory purpose for the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. (J.S. 35a)

peals also followed the plurality opinion and held that the *Zimmer* factors were relevant only insofar as they might elucidate the basic question of purpose (J.S. 35a), and that purpose must be decided "only in light of the totality of the circumstances." (J.S. 40a)

In assessing the District Court's opinion under the intent test, the Court of Appeals concluded:

> [A] careful reading of Judge Alaimo's order leads us inescapably to the conclusion that he made the type of independent inquiry into intent that we have said is necessary. (J.S. 53a)

Thus, while the appellants' Brief reads as if the Court of Appeals willfully disregarded *Mobile*, appellants ignore the conscientious effort of the Court to implement the *Mobile* ruling. The appellants' only real complaint here is with the facts that have been found against them, but as the Court of Appeals concluded after reviewing the record:

> Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. *His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact, virtually mandated by the overwhelming proof.* (J.S. 53a-54a) (Emphasis added).

As Chief Justice Burger has written, the Justices of this Court should defer to the trial court when intentional discrimination has been found, even if they might "have serious doubts as to how many of the [defendants' actions] can properly be characterized as segregative in intent and effect." *Columbus Board of Education v. Penick*, 443 U.S. 449, 468 (1979). That rule is even more appropriate here than in a school desegregation case, because the "extremely unique factual context for decision [puts the trial court] in a far better position to evaluate the local political, social, and economic realities." (J.S. 40a) Such deference is especially warranted in this case since the trial judge had served

as a county commissioner in another county, and he was uniquely qualified to determine the intent issue here.

The appellants' factual contentions should not be heard here for another reason. They did not challenge any of the findings as clearly erroneous in their appeal to the Fifth Circuit, and they cannot be raised now. Moreover, any challenge on the basis of the clearly erroneous test would be frivolous. The circumstantial evidence of intent was not merely substantial, it was overwhelming. (J.S. 54a)

The impact of the at-large system in Burke County is "an important starting point" in determining purpose. The impact here is "stark," so that evidence is particularly relevant. 429 U.S. at 266. Defendants admit that Blacks cannot be elected county-wide (T2 168), and Blacks are deterred from even running for office because of the impossibility of winning. There has been an unbroken history of opposition to political rights for Blacks. Virtually all Blacks were kept from the ballot until the federal government enacted the Voting Rights Act in 1965. The county commissioners then tried to eliminate all of the polling places in the County but one, voter registration was made inaccessible, county officials lied to Blacks who sought additional registration sites, courthouse registration alone was allowed until the federal court pressured the County into adding additional sites, and Blacks were getting the run around in the voter registration process as recently as 1976. Blacks are not allowed to serve as deputy registrars, and Blacks are not chosen to work at polling places. Blacks are excluded from the Democratic Party whose nominees invariably win local elections, the local Democratic Party has ignored rules on fair representation, and the process for qualifying to run in the democratic primary is virtually secret.

Blacks are "shut out of the normal course of politics" because of the "deep-rooted discrimination by Whites against Blacks." (J.S. 49a-50a, 88a-89a) Blacks fear reprisals should

they enter into the "white man's game" of politics, the major Black civic organization in the county cannot even have a written membership list because of fear of reprisals, and these cumulative fears are, unfortunately, the rational product of the very recent history of oppression, discrimination and outright violence directed at Blacks.

Blacks are discriminated against in all phases of local government. The county government rarely allows them to serve on any of the public boards and authorities that operate the government, Blacks were excluded from juries until a federal court order entered in 1977, and they were unconstitutionally denied access to the electoral process in Waynesboro, the county seat, until a court order entered in 1977. It is assumed in Burke County that Blacks should not have a role in politics, Whites rationalize the exclusion of Blacks on the basis that Blacks "are just not interested" in politics, and Whites have resisted desegregation in Burke County as long, hard and successfully as anywhere in the nation.

In determining purpose, the trial court considered a host of other discriminatory laws passed by Georgia (J.S. 76a, R. 334-38), many of which are still on the books. The pattern behind at-large elections is a telling factor in this case because 18 counties in Georgia switched from district elections to at-large elections after enactment of the Voting Rights Act when Blacks began to vote. (R. 398-99) Conversely, with the advent of the Black vote, no county voluntarily switched to a district system. That pattern is certainly some evidence of discrimination in the use of at-large elections. Similarly, Georgia recently adopted the numbered-post and majority-vote requirements, which give the majority White electorate in Burke County and nearly every other Georgia county complete control of all commission seats. Those laws were conspicuously adopted precisely

when Blacks began to vote in the 1960's. (J.S. 65a n.2)[18] The new 1976 Georgia Constitution readopted literacy and understanding tests, Ga. Code §2-403, which are inoperative solely because of the Voting Rights Act.

Much evidence was introduced concerning the racial attitudes of the White community and White public officials. It showed a firm commitment to segregation, a belief that Blacks were not political beings, and unyielding opposition to equal rights for Blacks.

While this is only a part of the evidence that was introduced, it certainly supports the trial court's finding that at-large elections in Burke County are one more in a series of many, many efforts to limit the civil and political rights of Blacks. There was virtually no countervailing evidence presented. The evidence of other purposes was unconvincing, an apparent effort to fabricate a pretext. Moreover, as this Court held in *Arlington Heights*, plaintiffs need not show that the sole motivation was discriminatory, but just that it be "a motivating factor." 429 U.S. at 265-66. The finding of discriminatory purpose here is not clearly erroneous.

It is clear in this case that Blacks attain a measure of fair treatment and equality in Burke County only when the federal government intervenes. That is no less true with the electoral process than in any other phase of Burke County life. Unless the federal courts intervene, Blacks will never be allowed to participate fully in the political process. So

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[18] The change to majority vote and numbered post were approved under Section 5 of the Voting Rights Act by the Attorney General. However, the United States later filed an action against the State of Georgia contending that Section 5 approval had been obtained fraudulently because the State had included them in a general recodification of the election code, and the United States had never been made aware of these changes when it passed on the general recodification legislation. *United States v. Georgia*, 436 U.S. 941 (1978).

long as the White politicians of Burke County are allowed to determine the rules of the "white man's game," those rules will be maintained to ensure that Blacks are excluded.

This Court has held that there is no constitutional violation where a minority group loses elections because of the normal "give and take" of the political process. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). As this Court said in *Feeney*: "It is presumed that 'even improvident decisions will eventually be rectified by the democratic process.' " 442 U.S. at 272. But where Blacks are completely excluded from the political process, and where they are subjected to ongoing intentional discrimination in all aspects of public and private life, then there is no "give and take," improvident decisions cannot be rectified by the democratic process, and judicial intervention is both necessary and appropriate. Blacks did not just "lose out" in politics in Burke County. They have never been a part of the political process there, they have no power to assert their interests, and they will remain impotent absent judicial relief.

### B. This Case Differs Significantly From The Facts And Issues Presented in Bolden

Although plaintiffs satisfied the burden imposed by the *Mobile* plurality, they also contend that this case is significantly different than the *Mobile* decision, and a different level of proof is appropriate here. In *Mobile*, the trial court invalidated the City's historic "commission" government and replaced it with an entirely new structure. Mobile's three elected commissioners acted as executives, as well as legislative policy-makers. The at-large election was an inextricable part of the commission form of government. As the District Court noted in *Mobile*, executive commissioners had to be elected at-large because of the nature of their responsibilities. *Bolden v. City of Mobile*, 423 F. Supp. 384, 402 n.19 (S.D. Ala. 1976). Thus, to eliminate at-large elec-

tions, the *Mobile* plaintiffs had to prove that the very form of the City's government was unconstitutional.

The present case is much different because the form of government is not at issue. The Commissioners here are entirely a legislative, policy-making body. (T. 237) Burke County commissioners make policies and pass ordinances. (T. 453-54) The county administrator, who is appointed, is the executive arm of government and is responsible for carrying out the commissioners' policies. (T. 496) Burke's commissioners can be elected from districts without difficulty.[18]

Where the "entire system of local governance" is challenged, as in *Bolden*, purposeful discrimination is more difficult to prove because there often are other factors that would justify the local scheme. 446 U.S. at 70. But where the question of districting alone is at issue, no automatic, non-racial justification is present, and a discriminatory purpose is more easily shown. Proof is easier because any districting decision is largely the determination of which voters will have what political "clout" in electing representatives. This very point was made by Justice Stevens in his concurring opinion in *Bolden*. 446 U.S. at 87-88. Because the impact of a districting scheme is so intimately related to the purposes of the districting, the effects of the election system are particularly important in determining the legal purpose in a case such as the present one.

*Bolden* is also very different from this case because the trial court there had made its decision only on the basis of

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[18] As the Court of Appeals held:

> [T]his is not a case like *Mobile v. Bolden*, in which an entire form of government was abandoned without consideration of the valid local interests in the maintenance of the existing system. In this case, unlike *Bolden*, the Court's order does not affect the existing allocation of executive and administrative responsibilities among the Burke County commissioners. (J.S. 54a-55a)

"effects." See *Moore v. Brown*, 448 U.S. 1335 (1980) (opinion of Justice Powell). The District Court in *Bolden* had concluded that Blacks were "excluded" from the political process, but only because Blacks had not won office, and because there was bloc voting in Mobile. 423 F. Supp. at 387-89. In the present case, the exclusion of Blacks from the political process was found by the District Court, in detailed findings, to result from past and present purposeful discrimination.

Finally, appellees contend that proof of specific discriminatory intent should not be necessary in a case such as the present one. In *White v. Regester*, 412 U.S. 755 (1973), this Court unanimously struck down multi-member legislative districts in two Texas counties. Unlike the present case, there was no finding that the multi-member districts were retained because of racial motives. Purposeful discrimination was proved in *White v. Regester*, but it was of a different kind. The plurality opinion in *Bolden* identified the factual proof in *White* as a "long history of official discrimination," legislative "indifference to minority needs," and the restricted "access of minority groups to the political process." 446 U.S. at 69. In Dallas County, this last factor was proved because Blacks had not been supported politically by a private citizen's group, and were thus less able to win county-wide election. In Bexar County, the evidence was simply the cultural barriers that impeded Hispanics' participation in the political process.

Thus, *White v. Regester* held that a districting system cannot be used which excluded a racial group from the political process, and where their exclusion is a result of (1) the challenged apportionment scheme, and (2) the consequences of past or present purposeful discrimination. *White* did not focus on the specific intent behind the apportion-

ment scheme. Appellees contend that *White*, decided unanimously, should still be good law.[17]

### C. The Other Issues Raised By Appellants Have No Merit

*First*, appellants contend that the Court of Appeals' emphasis on responsiveness was error. The Fifth Circuit held that unresponsiveness must be proved before plaintiffs can prevail. While it is true that this Court's decisions do not require such proof, that could only be a ground for complaint by an unsuccessful plaintiff who failed to satisfy this additional burden. Once the plaintiffs here overcame the burden of proving unresponsiveness, the Court of Appeals accorded this factor little evidentiary weight. The Fifth Circuit believed that unresponsiveness "is a factor of greater significance in its absence." (J.S. 47a n.41) Proof of unresponsiveness was considered only as some circumstantial evidence of intent. That inference is certainly not clearly erroneous in this case. As the Court concluded:

> Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke in every interaction

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[17] Similarly, an apportionment scheme may be enjoined as a remedial matter, regardless of purpose, where it perpetuates conditions flowing from past constitutional violations. State and local government have acted in concert here to extinguish black political activity. Quite clearly, as the District Court found, the effects of the long period of discrimination and oppression continue to this day. As a majority of this Court recently held in the Dayton and Columbus, Ohio school desegregation cases, the government has a continuing affirmative duty to eradicate the effects of discriminatory and segregative acts. Neutral actions, which may not independently be motivated for invidious purposes, are still illegal if they perpetuate the effects of past discrimination. *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). The same principal should apply here, as the United States argued below in its Amicus brief.

they have had with the White controlled bureaucracy. (J.S. 44a n.37)

Where discrimination is so pervasive and so rampant, this kind of "unresponsiveness" unquestionably provides some evidence to infer a discriminatory purpose in the use of at-large elections.

*Second*, appellants claim that various decisions of the Fifth Circuit are inconsistent. Even if true, that would hardly be grounds for reversal. But more importantly, this contention shows how appellants have misunderstood the ruling of the Court of Appeals in this case. In *McMillan v. Escambia County*, 638 F.2d 1239, 1247 n.16 (5th Cir. 1981), the Fifth Circuit held that *Zimmer* was "invalidated by *Mobile*." *McMillan* was decided before *Lodge*, and it clearly shows that the Fifth Circuit understands the import of *Mobile*. *Lodge*, like *McMillan*, expressly recognized that the *Zimmer* approach was rejected by the *Mobile* plurality. *Lodge* simply followed Justice Stewart's opinion and considered *Zimmer* evidence to the extent that it bore a direct evidentiary relation to the intent question.[18]

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[18] Appellants err when they argue that socioeconomics are irrelevant to this case. Contrary to their assertion, the lower courts here did not conclude that a disadvantaged group is "entitle[d] . . . to some special dispensation in the area of voting rights." (*Brief of Appellants* at 18) The tremendous socioeconomic disparity between Blacks and Whites is directly traceable, in substantial part, to slavery and past purposeful discrimination by the State of Georgia and Burke County government. (Robinson Depo. 64-65; J.S. 83a) As the lower courts found, these socioeconomic disparities directly impede the ability of Blacks to participate in the political process in Burke County. In *White v. Regester, supra*, far less evidence of socioeconomic depression among Hispanics was considered enough, without any further evidence, to invalidate a multi-member district. 412 U.S. 767-70. The socioeconomic picture in Burke County must be considered by a trial court that is attempting to assess the political realities of the county in determining the ultimate question of purpose.

*Third,* appellants cite testimony that at-large elections had not been a "political issue" before this case was filed. *Brief of Appellants* at 39. It is true that Blacks in Burke County have no capacity to make at-large elections a viable political issue there. It is equally true that, to the White politicians, Black unemployment is not an issue, the failure to appoint Blacks to boards is not an issue, the low level of Black voter registration is not of interest to them, and the exclusion of Blacks from every other phase of public life is "not a thing of interest." (T. 232, 241, 255-57, 256, 296, 306, 308, 392-98, 813) The fact that White politicians do not consider those things as issues, however, does not make them any less invidious or unconstitutional. Neither should the fact that Blacks cannot make at-large elections a political issue, without going to federal court, somehow excuse the defendants. It would be a strange rule that allowed a defense on the ground that Blacks are so excluded from politics that they cannot effectively assert the right to political equality.

*Fourth,* appellants seriously misrepresent the evidence in asserting that no electoral discrimination was shown, that Blacks have equal access to "slating" in the political process, and that Blacks themselves are the only group that conduct slating. The "slating" evidence in *White v. Regester* did *not* involve the ability of Blacks to get on the ballot, contrary to the representation of appellants. (*Brief of Appellants* at 30) Getting on the ballot in Dallas County was simple and straight-forward. The slating in Dallas County referred to the fact that a private civic organization carried substantial political clout in the County, and it supported relatively few Blacks (although it did slate some black candidates, and in those cases, it allowed black community leaders to select the candidates). *Graves v. Barnes,* 343 F. Supp. 704, 726 (W. D. Tex. 1972) The expulsion of Blacks from the political process in Burke County is dramatic by comparison. Blacks are excluded from the Demo-

cratic Party and the Democratic Committee, which is the one vehicle to election in Burke County.

Appellants claim that Black organizations conduct slating by publishing "tickets" for elections. No such finding was made. The only witness who testified from personal experience, testified that the "tickets" did not endorse candidates, but simply listed all candidates running in a given election. They were nothing more than sample ballots to educate Blacks—who had never been allowed to vote before in Burke County—what a ballot looked like. (T. 715-20)

Appellants assert that there has never been voting discrimination in Burke County. (*Brief of Appellants* at 33-35) Suffice it to say that this contention ignores the overwhelming evidence in the record, it ignores the findings and conclusions of two courts below, and it ignores the fact that none of these findings were challenged as clearly erroneous in the Court of Appeals.[19]

*Finally,* appellants discuss certain historical evidence relating to Burke County election laws. Appellees contend

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[19] Appellants also contend that the tremendous discrimination and segregation in Burke County education is irrelevant. *Id.* at 37. The county commissioners have not acted completely independently of the educational process in Burke County, as appellants state. To the contrary, the county commissioners got very involved in education when there was a threat to school desegregation. *Brief, supra,* at 16-17. The purposeful discrimination in education contributes to the exclusion of Blacks from the political process. Also, the attitudes of the White community and the government officials in other areas provide some evidence of the motivations behind at-large elections. As the trial court commented: "[School discrimination] may have some relevance to the attitude of whites in this county at times generally, on the question of segregation." (T. 61) The use of the evidence in that fashion is entirely proper. Most assuredly, had school integration been a smooth affair in Burke County, the appellants would be arguing that discrimination was a thing of the past in Burke County, that Whites did not object to integration, and that the District Court should have inferred from that fact a lack of discriminatory purpose in the use of at-large elections.

that this history is relevant because it shows that the very form of government was once before completely changed in Burke County for the specific purpose of eliminating Blacks. Since Blacks were an overwhelming majority of the County before the turn of the century (J.S. 83a n.18), and since Blacks were voting during Reconstruction, Blacks controlled county-wide voting at that time. They had all three of the county seats in the Georgia House of Representatives. Young, *The Negro in Georgia Politics*, 1867-1877 at 50 (Unpublished Thesis, Emory University Library, 1955) Since Blacks could similarly control the election of the ordinary, who was elected county-wide and who had governing authority over the County (*Brief of Appellants* at 41), the state legislature (which was dominated by Whites) simply eliminated elections. Instead, a board of commissioners was created to be appointed by the grand jury (Ga. Laws of 1873, p. 226) which did not include Blacks at that time. Young, *supra*, at 28. This historical sequence is stark, and it is explainable on no grounds other than race. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).[20]

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[20] Appellants raise two other arguments. They contend that vote dilution cases cannot be maintained against local governing bodies. That position is incorrect. The Thirteenth, Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965, apply with full force to local government, just as to state-wide bodies. Indeed, where intentional discrimination has been proved, as here, there could be no conceivable reason why the plaintiffs should not prevail.

Appellants also contend that they should have had an opportunity to submit an election plan under Section 5 of the Voting Rights Act. This contention was never raised in the Court of Appeals, and it is moot now in any event. The special election called for has passed, and how a remedy should now be implemented for future elections should be considered first by the District Court.

## II. Statutory Election Cases May Be Maintained Without Proving Intentional Discrimination.

Appellees contend that they should prevail under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, without proving intentional discrimination. In *Mobile*, three Justices took no position on the statutory issue, and there was no majority view. The plurality concluded, after an admittedly "cursory examination," that Section 2 adds absolutely nothing to the law, that it requires proof of purposeful discrimination, and that it does not even apply to vote abridgement and dilution cases. 446 U.S. at 60-61.

The plurality's cursory conclusion was wrong, as is apparent if one simply compares Sections 2 and 5, and this Court's prior decisions. Sections 2 and 5 both cover the exact same kinds of electoral practices—namely, any "voting qualification or prerequisite to voting, or standard, practice, or procedure." This Court has held that that language includes at-large elections in a Section 5 case. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). Since the provision is identical in both sections, at-large elections are unquestionably covered by Section 2 as well.

The only question is what standard of proof is necessary in a Section 2 case. Here, no one can dispute that at-large elections exclude Blacks from the political process by perpetuating the effects of past discrimination, regardless of the subjective intentions that might motivate retention of the scheme. That should be enough to prevail in a Section 2 case.[21] *Compare Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (Chief Justice Burger); *City of Rome v. United*

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[21] One could also argue that Section 2 reaches any discriminatory effects, even if they do not result from past discrimination. That issue need not be reached here in light of the evidence and findings in this case.

*States*, 446 U.S. 156 (1980). The United States asserted its agreement with this position in its Amicus brief in the Court of Appeals. The legislative history supports it entirely. The whole purpose of the Act was "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination . . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs." 111 Cong. Rec. 8295 (1965) (Sen. Javits).

Nothing in the language of the Act or the legislative history suggests that the broad language of Section 2 was aimed only at intentional discrimination. While Section 2 does not expressly incorporate either a "purpose" or an "effect" test, the Voting Rights Act did specify a particular test on ten other occasions that appear in eight separate provisions. (Sections 3(b), 3(c), 4(a), 4(d), 5 and 10(a)(iii)). In each instance, Congress condemned "tests," "devices" and "voting practices" used "for the purpose *or with the effect*" of "denying or abridging the right to vote on account of race or color." In no instance did Congress require proof of purpose in addition to effect. To read an intent requirement into Section 2 would fundamentally rewrite the section in a way that is inconsistent with everything else in the Act.

This Court has held that Section 5 of the Voting Rights Act should be given the "broadest possible scope" in order to reach "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 38 (1978). Congress has approved this Court's broad readings of Section 5. *Id.* at 39-40. Congress could not have meant for this Court to turn around and read Section 2 so narrowly that it means absolutely nothing, which is precisely what Justice Stewart did. Under his view, Section 2 is a hollow reenactment of the prohibi-

tions already contained not only in the Constitution, but also in 42 U.S.C. §1971(a)(1), which provides that citizens "shall be able to vote . . . without distinction of race."[22]

All of the legislative history supports plaintiffs' position. In the only instance where the standard of proof under Section 2 was expressly discussed, Attorney General Katzenbach stated that it reached all procedures with the "purpose or *effect*" of discrimination.

> I had thought of the word "procedure" as including any kind of practice of that kind if its purpose *or effect* was to deny or abridge the right to vote on account of race or color. (Emphasis added) *Hearings on S.1564 before the Comm. on the Judiciary*, United States Senate, 89th Cong., 1st Sess., 191 (1965) [hereinafter, "*1965 Senate Hearings*"].

The plurality opinion in *Mobile* relies on the evidence that Section 2 was designed basically to reach Fifteenth Amendment violations. Since the plurality felt that the Fif-

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[22] By comparison, Title VII requires a finding that the "respondent has *intentionally* engaged in or is *intentionally* engaging in" discrimination. That provision has been interpreted to prohibit discrimination regardless of motive. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Section 2 is obviously less of a "motive" statute than Title VII. It speaks of practices that are "imposed or *applied*" that "deny or abridge" the right to vote. These are not "intent" terms, particularly in comparison with the language of Title VII.

Other evidence supports the plaintiffs' view. The Conference Committee on the Voting Rights Act specifically deleted from the criminal provisions any requirement that a defendant act "wilfully and knowingly" or "fraudulently," limitations that had been included in the Senate bill. *U.S. Code, Cong. & Admin. News* 2581 (1965). The Senate had tried to include those restrictions simply "to make it clear, for example, that no criminal violation is involved where a person acts inadvertently." *Id.* at 2567. The Senate position was rejected. Given this stringent criminal provision, "intent" and "purpose" should hardly be read into the *civil* remedy under Section 2.

teenth Amendment reached only the most blatant kinds of intentional voting discrimination, they concluded that Section 2 was similarly limited. It is true that Congress largely equated Section 2 with Fifteenth Amendment prohibitions. But the plurality's conclusion is wrong because, in equating the two, Congress held a far different concept of what the Fifteenth Amendment meant than the *Mobile* plurality. The testimony and debates are replete with comments which show that Congress understood the Fifteenth Amendment to ban practices that had the *effect* of discriminating. See, e.g., *1965 Senate Hearings*, at 194, 236 and 239; *Hearings on H.R. 640 before Subcom. No. 5 of the Com. on the Judiciary*, House of Reps. 89th Cong., 1st Sess. at 50, 59-61 (1965) [hereinafter, *1965 House Hearings*]; 111 Cong. Rec. 10453-54 (Sen. Prouty), 10456 & 11402-05 (Sen. Hart); 11744-47 (Sen. Saltonstall); and 8296 (Sen. Mansfield).

Attorney General Katzenbach's testimony is especially persuasive in construing the Voting Rights Act because he was so intimately involved in "drafting the statute and explaining its operation to Congress." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 131 (1978). Mr. Katzenbach time and again equated the Fifteenth Amendment with a purpose or effect test. For example, he believed that Sections 4 and 5, which expressly use "purpose or effect" tests, just covered Fifteenth Amendment violations. When testifying before the House on the Section 5 preclearance provision, he stressed that "the only laws that are struck down in this are those that are in violation of the 15th amendment." *1965 House Hearings* at 90. To satisfy Section 5, the State or local government had only to show "the court that the new provision is constitutional." *Id.* at 94. See also *id.* at 102; H.R. Rep. No. 439, at 19; S. Rep. No. 162, at 19.

Thus, Congress did largely equate the scope of Section 2 with the Fifteenth Amendment, but Congress also equated

Section 5 with the Fifteenth Amendment. Congress understood all three to include acts with the *effect* of discriminating. Section 2 and Section 5 were identical in their substantive coverage. They differed only in that Section 5 required proof of nondiscrimination *before* a change could be effected.

This view has been confirmed implicitly by subsequent actions of Congress. While space does not permit a discussion of all this legislative history, nor of all the 1965 history, much of it is set out in the United States Amicus Brief that was filed below.

The action of the House in 1981 explicitly confirms the historical record. Reacting to Justice Stewart's reading of Section 2, the House passed a specific amendment to make it clear that intent is not required under the law. At the same time, the House stated unequivocally that the amendment was only a clarification. Section 2 was never supposed to require proof of intent.[23]

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[23] The Committee does not agree with [Justice Stewart's] construction of Section 2 and believes that the intent of the section should be clarified.

. . . . .

The purpose of the amendment to section 2 is to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice.

. . . . .

By amending Section 2 of the Act Congress intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it. H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 29-30 (1981)

Finally, Sections 2 and 5 should be read the same if only to avoid the absurd consequences of reading them differently. Acting under Section 5, this Court has already invalidated at-large elections in Wilkes County, Georgia, which is adjacent to Burke County. *Wilkes County v. United States*, 439 U.S. 999 (1978). The evidence of discrimination in Wilkes County was trifling by comparison to the present record. It would be wholly irrational to hold that the same election system is legal in Burke County, where the only difference is the date of adoption, because an entirely different legal test applies under Section 2. To make the date of enactment determinative would be especially ironic since Blacks were not even a part of the political process that led to the adoption of at-large elections in Burke County in 1911. Congress did not intend to create such a hodge-podge, and this Court should not construe the Act to produce such inconsistencies.

## III. The Judgment of the Lower Court Should Be Affirmed On The Basis Of the Fifteenth Amendment

The Fifteenth Amendment was misconstrued in *Mobile*. The plurality concluded that it was inapplicable because the District Court had found that Blacks "register and vote without hindrance." 446 U.S. at 65. By limiting the Amendment to cases where the right to vote is absolutely denied, Justice Stewart's opinion rewrites the Amendment by deleting the words "or abridged." Justice Stewart also concluded that the Fifteenth Amendment required proof of purposeful discrimination. The plurality view would read the Amendment out of the Constitution. There is no situation where it would apply, that would not already be unconstitutional under the Fourteenth Amendment.

While Justice Stevens concluded that the Fifteenth Amendment reaches dilution cases, that opinion would also appear to be at odds with the literal text of the Constitu-

tion. Justice Stevens believed that the Constitution "must apply equally to all forms of political gerrymandering—not just a racial gerrymandering." 446 U.S. at 86. Justice Stevens' position cannot be supported by the express language of the Constitution. The Fifteenth Amendment does not apply to "political" gerrymandering. It applies solely to electoral practices, be they gerrymandering or otherwise, that discriminate on the basis of race. Whatever may be the standard for testing an apportionment scheme challenged on political grounds, the test must be broader when the challenge is based on race. That follows directly from the fact that there is a specific amendment dealing with the denial *or abridgement* of the right to vote on account of race.

Opponents of the Fifteenth Amendment complained in 1869 that it would invade states' rights by making the right to vote subject to federal judicial and congressional protection. The opponents were defeated, and their arguments were rejected. They should not be given a belated victory one hundred and ten years later by this Court construing the Fifteenth Amendment to mean nothing.

The supporters of the Amendment were convinced that it was necessary to insure "against oppression" of black people. 40 Cong. Globe 668 (1869) Senator James Dixon of Connecticut was typical in stating that the Fifteenth Amendment was an especially important addition to the Constitution.[24] Proposed amendments with narrower lan-

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[24] "[I]t rises far above the question of any mere detail as to suffrage; far higher in importance than the question even of abolishing slavery in the States; far higher than any proposition which has ever been made with regard to the amendment of the Constitution, because it is in its truest sense radical and revolutionary. It strikes at the very root and foundation of the Government; it removes its cornerstone, and changes the entire character of the State governments." 40 Cong. Globe 668 (1869).

guage were made, and rejected, in favor of the Fifteenth Amendment with its broad "deny or abridge" prohibition.

The Fifteenth Amendment was intended to be a broad prohibition reaching beyond the Thirteenth and Fourteenth Amendments. It should be construed to reach the overwhelming evidence in this case that black people are not allowed a reasonable opportunity to participate in the political process, and to hold office, in Burke County.

## IV. The Judgment Of The Lower Court Should Be Affirmed On The Basis Of The Thirteenth Amendment

Last term, this Court found that the Thirteenth Amendment was not implicated in a case where a municipal street had been closed. *City of Memphis v. Greene*, 101 S.Ct. 1584 (1981). That case left open the question of whether proof of purposeful discrimination is necessary under the Thirteenth Amendment, and the question of what is made illegal by the force of Section 1 of the Amendment.

In a case such as the present one, there should be no requirement of proving specific intent to discriminate under the Thirteenth Amendment, or the promise of that Amendment will remain unfulfilled. There were two fundamental characteristics of slavery. One was the complete elimination of the slaves' political rights. The other was the subjugation of slaves economically. This case deals principally with the former.

Absent judicial relief, Blacks will not enjoy the "universal civil and political freedom" envisioned by the Amendment. *Civil Right Cases*, 109 U.S. 3, 20 (1883) Except for the short interlude of Reconstruction, Blacks have never enjoyed meaningful participation in the political process in Burke County. They have been denied political equality by a combination of private and governmental actions. The Thirteenth Amendment, of course, reaches private conduct.

*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). For that reason, neither the concept of *de jure* discrimination, nor purposeful discrimination, should have any place in the Thirteenth Amendment in a case such as the present one.

The Thirteenth Amendment was not passed simply to abolish the formalisms of slavery. It was designed instead to accomplish broader purposes, and "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody code; its dark, malignant barbarizing spirit." 38 Cong. Globe 1319-24 (1864). The framers intended the Amendment to do more than simply free the slaves who were still in bondage at the time. tenBroeck, *The Thirteenth Amendment to the United States Constitution*, 39 Cal. L. Rev. 171, 180 (1951). Nowhere do the debates reveal any language limiting the construction of the Amendment to formal slavery *per se*.

The vestiges of slavery are most assuredly present in Burke County. The District Court was explicit in its finding that the "vestiges of slavery" exist here (J.S. 95a), and the Court of Appeals concluded much the same thing. (J.S. 55a). The promise and command of the Thirteenth Amendment have been only partly fulfilled in Burke County. Since 1864 and their defeat in the Civil War, the white people in Burke County have continued to oppose full and equal rights for black people by every means at their disposal. They have been very successful, and the "badges and incidents" of slavery remain very much in place. Until they are eliminated, the command of the Amendment has not been met.

## CONCLUSION

Appellees respectfully pray that the judgment of the Court of Appeals be affirmed.

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